87-636

No. 87-_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

EFTHIMIOS A. KARAHALIOS,

Petitioner,

v.

DEFENSE LANGUAGE INSTITUTE/FOREIGN LANGUAGE CENTER, PRESIDIO OF MONTEREY, and LOCAL 1263, NATIONAL FEDERATION OF FEDERAL EMPLOYEES,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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October 5, 1987

QUESTION PRESENTED FOR REVIEW

Does a federal employee whose union has breached its duty of fair representation have a cause of action against the union for damages which may be brought in federal district court; or is the employee relegated to seeking administrative relief before the Federal Labor Relations Authority?

LISTS OF PARTIES TO THE PROCEEDINGS

The plaintiff-petitioner in this case is Efthimios A. Karahalios.

The defendant-respondent in this case is Local 1263, National Federation of Federal Employees. An additional defendant below, Defense Language Institute/Foreign Language Center, Presidio of Monterey is not a party which has an interest in the outcome of this petition.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Efthimios Karahalios prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit. The court of appeals held that an employee of a federal agency could not sue his union for breach of the duty of fair representation in federal district court. The appellate court found that such suits were pre-empted by passage of Title VII of the Civil Service Reform Act of 1978 ("CSRA"), 5 U.S.C. Sections 7101-7135, and reversed the federal district court's judgment in favor of Karahalios.

The district court held that, by analogy to *Vaca v. Sipes*, 386 U.S. 171 (1967), causes of action for breach of the duty of fair representation for employees in the federal sector were an exception to the pre-emption doctrine, and were not pre-empted by the CSRA. After the trial, the district court found that the union was guilty of three separate breaches of the duty of fair representation.

OPINIONS BELOW

The opinion of the court of appeals is reproduced in Appendix A to this petition. The opinions of the U.S. District Court for the Northern District of California have been reported as *Karahalios v. Defense Language Inst.*, 534 F. Supp. 1202 (N.D.Cal. 1982) (*Karahalios I*), *Karahalios v. Defense Language Inst.*, 544 F. Supp. 77 (N.D.Cal. 1982) (*Karahalios II*), and *Karahalios v. Defense Language Inst.*, 613 F. Supp. 440 (N.D.Cal. 1984) (*Karahalios III*).

JURISDICTION

The decision of the court of appeals was entered on July 13, 1987. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1). This petition is filed within ninety (90) days after the entry of decision

of the court of appeals, pursuant to 28 U.S.C. Section 2101(c) and Rule 20.2, Rules of the United States Supreme Court.

STATUTORY PROVISIONS INVOLVED

This case involves the general federal question jurisdiction statute, 28 U.S.C. Section 1331, and Title VII of the Civil Service Reform Act of 1978 (Federal Service Labor-Management and Employee Relations Statute) ("CSRA"), 5 U.S.C. Sections 7101 *et seq.*

STATEMENT OF THE CASE

The issue in this case is whether a federal employee whose union has breached its duty of fair representation may sue the union in federal district court for the damages caused by the union's breach.

In 1976, petitioner Efthimios A. Karahalios was a Greek language instructor at the Defense Language Institute (DLI) in Monterey. He had worked for DLI for almost 20 years, and his work had been highly praised. When a higher position (course developer) became available at a substantial increase in pay and prestige, Karahalios (a non-union member, but part of the collective bargaining group) went through the

competitive civil service selection process, and was awarded the job.

Karahalios performed competently in the job for over a year. In the interim, another employee, Simon Kuntelos, who had declined to go through the selection process by which Karahalios was selected, filed a grievance alleging that Kuntelos should have been given the course developer job. Kuntelos (a union board member) requested that the union arbitrate his grievance.

The union decided to arbitrate for Kuntelos without giving Karahalios notice that it was considering doing so; without considering Karahalios' qualifications for the job; and without taking into account the effect which the arbitration might have on Karahalios' job.

When the Kuntelos arbitration took place, the union failed to give Karahalios notice of the hearing, or the opportunity to be present. Even though Karahalios was not a party to the arbitration, had not been given notice of the hearing, and was not present at the hearing, and even though Karahalios had been performing competently in the job for over a year, the arbitrator decided that Karahalios' job should be "reconstituted", which meant that Kuntelos could, after

the fact, go through the competitive selection process for Karahalios' job.

Kuntelos went through the selection process under radically different conditions than Karahalios. He was the only one being tested (test was not being given anonymously), and was given almost twice as long to take the test. He scored in the same grade class ("qualified") as Karahalios, was selected for the job, and Karahalios was demoted.

Karahalios objected to the process by which he was deprived of his job. He filed grievances with the employer which were denied. Then he asked the union to arbitrate on his behalf, which decided not to arbitrate, without any consideration of the merits of Karahalios' case. The union decided that it could not consider arbitrating Karahalios' grievances as it had a "conflict of interest" due to its earlier participation in the Kuntelos arbitration.

Karahalios then attempted to arbitrate his grievances with the employer, which declined on the basis that only the union could request arbitration, not the employee.

Karahalios then filed unfair labor practice charges with the Federal Labor Relations Authority (FLRA).

The FLRA General Counsel ruled that the union had violated its duty of fair representation and ordered a complaint issued against the union.

However, the FLRA and the union subsequently entered into a settlement with the union whereby the union simply agreed to post a notice indicating that it would not undertake similar acts in the future. Karahalios objected to the settlement, as it did not address the damages done to him by the union. He later unsuccessfully appealed the settlement to the FLRA General Counsel.

Karahalios then filed this lawsuit in federal district court. Prior to trial, the United States District Court for the Northern District of California held that, by analogy to the NLRA setting under *Vaca v. Sipes*, 386 U.S. 171 (1967), the district court had jurisdiction of the duty of fair representation claim. *Karahalios I*, 534 F.Supp. 1202, 1208 (N.D.Cal. 1982).

After trial, the district court found that the union had breached its duty of fair representation to Karahalios in three separate instances: (1) deciding to arbitrate on behalf of Kuntelos for Karahalios' job without notifying Karahalios, (2) failing to provide Karahalios notice of the arbitration, and (3) refusing to arbitrate for Karahalios without considering the merits

of his claim. *Karahalios III*, 613 F.Supp. 440, 446-47 (N.D.Cal. 1984). The court did not award back pay because it could not find Karahalios had a "clear edge" over Kuntelos[1], *Id.* at 449, but did award Karahalios his attorneys' fees. *Id.* at 449-51.

The U.S. Court of Appeals for the Ninth Circuit reversed, holding that, by passing the CSRA, Congress intended to prevent a federal employee from suing his union for breach of the duty of fair representation in federal court, as the employee could bring his case before the Federal Labor Relations Authority.

This petition for a writ of certiorari followed.

[1]The extent of damages awarded by the trial court was the subject of a cross-appeal to the Ninth Circuit. Inasmuch as the Ninth Circuit found that no jurisdiction existed to hear plaintiff's claim, the damages issue has not yet been addressed.

REASONS FOR GRANTING THE WRIT

I. The Decisions of the Courts of Appeal Are Completely Divided On This Issue; Decisions of the Tenth Circuit and the Fourth Circuit Directly Conflict With Decisions Of The Eleventh Circuit, The Ninth Circuit and The Third Circuit.

This case raises an issue of importance to every federal employee involved in the collective bargaining process: when a union breaches its duty of fair representation, can the employee injured by the union's actions sue the union for damages in federal district court (a right which every employee subject to the National Labor Relations Act has); or did Congress intend by passage of the Civil Service Reform Act of 1978 that unions of federal employees (unlike unions of non-federal employees) should be shielded from employee damage actions in district courts? The five federal courts of appeal which have considered this issue are squarely in conflict.

The Tenth Circuit holds that an employee may sue his union when it breaches its duty of fair representation, finding that this case is no different than *Vaca v. Sipes*, 386 U.S. 171 (1967). *Pham v. American Fed'n of Gov't Employees, Local 916*, 799 F.2d 634,639 (10th Cir. 1986). This rule also obtains in the

Fourth Circuit, which affirmed without opinion a district court's holding in *Naylor v. American Fed'n of Gov't Employees, Local 446*, 580 F.Supp. 137 (W.D.N.C. 1983), that it had jurisdiction to hear a federal employee duty of fair representation suit. *Naylor v. American Fed'n of Gov't Employees, Local 446*, 727 F.2d 1103 (4th Cir. 1984), *cert. denied*, 469 U.S. 850 (1984).

In contrast, the Eleventh Circuit holds that passage of the CSRA demonstrated Congressional intent to pre-empt federal employee duty of fair representation actions from the district courts, and that no jurisdiction exists in the district court to consider such claims. *Warren v. Local 1759, American Fed'n of Gov't Employees*, 764 F.2d 1395, 1399 (11th Cir. 1985), *cert. denied*, 106 S.Ct. 527 (1985). The Ninth Circuit in the present case is in accord with this view. Similarly, the Third Circuit has affirmed in an unreported memorandum decision a district court's holding that it lacked jurisdiction to hear the employee's claim in this situation. *Wilson v. United States Bureau of Prisons*, Case No. 84-5735 (3d Cir. 1985) (unreported memorandum decision), *affirming* Case No. 83-0805 (M.D.Pa. 1984) (unreported memorandum order).

The issue of whether an employee may bring a cause of action against his union in district court is

squarely presented in this case, especially since here there has been a decision on the merits that the union was guilty of multiple breaches of the duty of fair representation. *Karahalios III*, 613 F.Supp. 440, 446-47 (N.D.Cal. 1984). Thus a complete record is available here for the Court to review.

II. Review By This Court Is Necessary To Provide Uniform Administration Of the Federal Labor Relations System Regarding The Remedies Available To An Employee Injured By His Union's Conduct.

Whether a union operating in the federal arena should be shielded from liability for its misconduct towards one of the members of its bargaining group is an issue which rests at the core of the federal labor relations system, and literally affects hundreds of thousands of employees in the federal government.

Is the injured employee relegated to complaining to the Federal Labor Relations Authority, an administrative agency which has been criticized for not vigorously enforcing the duty of fair representation? Broida, *Fair Representation for Federal Employees : An Overview*, 30 Fed. Bar News & J. 440, 442 (1983) In this case, for example, the FLRA remedy only impacted the future behavior of the union -- it provided no

redress whatsoever for the harms suffered by Karahalios.

Or, on the other hand, is the federal employee entitled to redress his grievances against his union in the same manner as an employee in the NLRA framework, i.e., by a lawsuit in a federal district court, a forum which is designed to focus on the harm done to the individual, not an administrative agency such as the FLRA which may well be more concerned with fashioning system-wide remedies at the expense of the individual employee?

This Court has repeatedly emphasized that the right of the employee to be made whole is of paramount importance in the administration of the labor relations system. *Bowen v. United States Postal Service*, 459 U.S. 212, 222 (1983); *Vaca v. Sipes*, 386 U.S. 171, 185-86. As Mr. Justice White noted in *Vaca*:

> "The existence of even a small group of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation." 386 U.S. at 183.

These same policy concerns are no less present for a federal employee than for a postal worker, a steelworker, or a railroad worker. The FLRA's attention is centered upon administrative remedies, not the harm done to the individual employee. Even if the FLRA finds that the union breached its duty of fair representation to the employee (as it did here), the FLRA's administrative remedy is not necessarily devised to right the wrong done to the employee. The only forum designed to redress these grievances is the federal district court.

CONCLUSION

The issue in this case is important to the basic conceptual framework of the federal labor relations system. The circuit courts of appeal are squarely in conflict on this issue. The only way in which to bring uniformity to the federal labor system is review by this Court.

Respectfully submitted,

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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EFTHIMIOS A. KARAHALIOS,

Plaintiff-Apellee/
Cross-Appellant.

v.

DEFENSE LANGUAGE INSTITUTE/
FOREIGN LANGUAGE CENTER
PRESIDIO OF MONTEREY,

Defendant,

Local 1263, National Federation
of Federal Employees,

Defendant-Appellant/
Cross-Appellee.

Nos. 85-1602;
85-1626;
86-2006

D.C. No.

CV-81-2745-RFP

OPINION

Argued and Submitted
April 16, 1987 -- San Francisco, California

Filed July 13, 1987

Before: Procter Hug, Jr., Dorothy W. Nelson and
John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Noonan

Appeal from the United States District Court
for the Northern District of California
Robert F. Peckham, District Judge, Presiding

COUNSEL

Thomas R. Duffy, and Richard De Stefano, Beverly Hills, California, for the plaintiff-appellee/cross-appellant.

Patrick J. Riley, Washington, D.C., for the defendant-appellant/cross-appellee.

Stuart A. Kirsch, College Park, Georgia, for amicus curie.

OPINION

NOONAN, Circuit Judge:

Efthimios A. Karahalios brought suit against the Defense Language Institute/Foreign Language Center Presidio of Monterey (DLI) and Local 1263, National Federation of Federal Employees (the Union). The original incident occurred in 1976. The suit against DLI has been settled. Karahalios and the Union both

appeal from the judgment of the district court. The case presents a question of first impression in this circuit as to whether a district court has jurisdiction to entertain an action by a federal employee against his union. Holding jurisdiction does not exist, we reverse.

FACTS AND PROCEEDINGS

In 1976 Karahalios was a Greek language instructor at DLI when a higher position, "Course Developer," was reopened. This position had been held by Simon Kuntelos, who had been demoted to instructor when the position had been closed. Kuntelos believed he was entitled to non-competitive promotion back to his old job and declined to participate in the competitive examination required by DLI. Karahalios took the examination and was made course developer.

Kuntelos complained to the Union which, without telling Karahalios, brought a grievance on Kuntelos's behalf. As a result, an arbitrator decided that Kuntelos should be considered. Kuntelos then took the

examination, was given substantially more time to complete it than had been afforded Karahalios and received a grade of 83 as compared to Karahalios' 81. Kuntelos was appointed course developer and Karahalios was demoted. Kuntelos's success was short-lived, however: he was appointed in May 1978, and the position was dropped in October 1979.

Karahalios objected to his demotion and filed grievances with DLI which were denied. The Union refused to take his grievances to arbitration on the ground that, since it had represented Kuntelos, it had a conflict of interest. Karahalios then filed unfair labor practice charges with the Federal Labor Relations Authority (FLRA). FLRA's General Counsel ruled that the Union had violated its duty and ordered a complaint issued against the Union. But the Union and the regional director of the FLRA settled, with the Union simply agreeing that in the future it would not inform employees that it could not represent more than one employee seeking the same position. Karahalios derived

no benefits from the settlement, which he unsuccessfully appealed to the General Counsel.

Karahalios then filed suit in the district court against both DLI and the Union, alleging that DLI had breached the collective bargaining agreement and that the Union had breached its duty of fair representation. In the first of its three published opinions in this case, the district court held that, while it lacked jurisdiction over the claim against DLI, Karahalios' claim against the Union posed a federal question and the FLRA's jurisdiction was not exclusive. *Karahalios v. Defense Language Inst.*, 534 F. Supp. 1202, 1208 (N.D. Cal. 1982) (*Karahalios I*). The court noted that, just as the NLRB was more concerned with broad questions of policy than with individual rights, so was the FLRA. The court declared, "Plaintiff, then, lacks an adequate administrative remedy as did the petitioner in *Vaca v. Sipes*." *Karahalios I*, 534 F.Supp. at 1208.

Karahalios II held that the court would not assume pendent jurisdiction over Karahalios's claim against DLI

for breach of the collective bargaining agreement. *Karahalios v. Defense Language Inst.*, 544 F. Supp. 77, 78 (N.D. Cal. 1982). *Karahalios III* found that the Union had breached its duty of fair representation by (1) deciding to arbitrate on behalf of Kuntelos without consultation with Karahalios, (2) failing to notify Karahalios of the arbitration, and (3) refusing to arbitrate for Karahalios without considering the merits of his claim. *Karahalios v. Defense Language Inst.*, 613 F. Supp. 440, 446-47 (N.D. Cal. 1984). The court further held that it could not determine Karahalios's damages because he and Kuntelos "were simply too evenly matched for the court to find that plainifff had a clear edge." *Id.* at 449. The court did award Karahalios attorney's fees of $35,000 on the theory that the Unions' breach of duty had caused Karahalios to litigate and on the further theory that Karahalios's suit had been of benefit to the Union and all its members. *Id.* at 449-51.

The Union appeals the rulings against it; Karahalios appeals the denial of damages.

ANALYSIS

Several issues are presented by the appeal, but the jurisdictional issue is dispositive. As the issue is one of law, we review de novo. *South Delta Water Agency v. Department of Interior*, 767 F.2d 531, 535 (9th Cir. 1985). On the question of jurisdiction there is a present split of authority. Compare *Pham v. American Fed'n for Gov't Employees, Local 916*, 799 F.2d 634 (10th Cir. 1986) with *Warren v. Local 1759 Am. Fed'n of Gov't Employees*, 764 F.2d 1395, 1399 (11th Cir. 1985), *cert. denied*, 106 S.Ct. 527 (1985). Resolution of the conflict depends on interpretation of the Title VII of the Civil Service Reform Act of 1978, (CSRA) 5 U.S.C. Sections 7101-7135, in the light of *Vaca v. Sipes*, 386 U.S. 171 (1976) and other statutes enacted by Congress dealing with the rights of employees and unions.

Interpreting the Labor Management Relations Act, the Supreme Court in *Vaca* held that where a union arbitrarily refused to process a grievance, the injured

employee had a right to sue the union in the district court. The Court refused to believe that Congress intended to confer upon unions "unlimited discretion to deprive injured employees of all remedies for breach of contract." 386 U.S. at 186. The Court bolstered its reasoning by pointing to the possibility of actions in the district court under Section 301 and Section 303 of the Labor Management Relations Act (29 U.S.C. Sections 185, 187). Congress, the Court noted, had not meant to give the NLRB exclusive jurisdiction. *Id.* at 179.

There is no statutory provision analogous to Section 301 or Section 303 under the CSRA, and as there has been no waiver of immunity by the United States, the government could not be sued by a federal employee. But this difference alone would not justify us in concluding that the basic rationale of *Vaca* does not speak here. In the absence of other indication of congressional intent, we would hold here, too, that Congress has not intended to confer upon unions unlimited discretion.

When Congress enacted the CSRA the federal courts had implied a duty of fair representation not only under the National Labor Relations Act as in *Vaca*, but also under the Railway Labor Act. *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944). Aware of these decisions and aware of how important *Steele*, the seminal case, had been in protecting the rights of racial minorities, Congress itself imposed the duty of fair representation on federal unions. But, aware of the decisions, Congress also failed to provide jurisdiction in the federal courts to enforce the duty.

Argumentum ex silentio is normally weak, though sometimes helpful. Here the silence of Congress appears to be deliberate. The House version of the Civil Service Reform Act authorized "any party to a collective bargaining agreement," aggrieved by the other party's failure to arbitrate, to file a petition in the appropriate district court for an order that arbitration proceed. *H.R. Rep. No. 95-1403, 95th Cong., 2d Sess.* 286 (1978). The Senate version of the Act did

not contain this jurisdictional grant. The Conference Committee rejected the provision in the House bill, stating, "All questions of this matter will be considered at least in the first instance by the Federal Labor Relations Authority." *H.R. Rep. No. 95-1717, 95th Cong., 2d Sess.* 157 (1978) *reprinted in* 1978 U.S. Code Cong. & Admin. News 2860, 2891. It is true that the provision which the Conference Committee eliminated did not deal with the claim of an employee against his union. But it is also true that the enforcement scheme chosen by Congress showed a strong preference for keeping the interpretation and enforcement of collective bargaining agreements within the process of arbitration, to be reviewed in the first instance by the FLRA. *See generally* Comment, *Federal Sector Arbitration Under the Civil Service Reform Act of 1987*, 17 San Diego L. rev. 857 (1980). Judicial review of a final order of the FLRA is assured by the statute. 5 U.S.C. Section 7123.

There is more than silence on the part of Congress. In the statute at bar there is an express

provision that "a labor organization which has been accorded exclusive recognition...is responsible for representing the interest of all employees in the unit it represents without discrimination." 5 U.S.C. Section 7114(a)(1). The statute goes on to give the FLRA the power to remedy a breach of this duty by awarding back pay against a union that has breached its duty. 5 U.S.C. Section 7118(a)(7). There is a fit between the duty and the remedy provided.

True, the FLRA has been criticized for not enforcing the duty of fair representation vigorously enough. Broida, *Fair Representation for Federal Employees: An Overview*, 30 Fed. Bar News & J. 440, 442 (1983). However, the General Counsel received only 270 cases of complaints against labor organizations in fiscal 1985 and only 227 in fiscal 1986, representing respectively 6.6 percent and 4.4 percent of the complaints received by his offices. The General Counsel in 1986 dismissed 49 percent of these charges

and 25 percent were withdrawn; 13 percent were settled. The General Counsel issued 31 conplaints. FLRA, *Report on Case Handling Developments of the Office of the General Counsel*, FLRA Doc. 1335 (Feb. 1987) pp. 39 and 53. It is of course open to interpretation whether the small number of complaints actually issued reflects lack of zeal or lack of real problems in this area. We have insufficient evidence to conclude that the FLRA does an inadequate job in protecting the rights of the individual worker in relation to a federal union.

In the present case, it is evident that the FLRA preferred a settlement with implications for all employees in the future to making Karahalios whole. The facts of this case, on the other hand, indicate that the existence of a district court remedy after investigation and issuance of a complaint by the General Counsel may lead to a tortuous path of litigation whcse costs are disproportionate to the individual benefit achieved and whose protracted twists

and turnings must be as disheartening to any eventual winner as they are to any eventual loser. In summary, whether the microcosm of this case is studied or whether the general practice of the FLRA is reviewed, no strong reason appears to overturn what seems to be the congressional intent to channel the grievances of federal employees to the Federal Labor Relations Authority.

A paradox: where Congress recognized no duty on a union's part the courts shaped a remedy more potent than the remedy here provided by a statute. The paradox arises because where Congress created the duty it also tempered the remedy. Judicial creativity was thus restrained. We must act within the statutory scheme.

The judgment appealed from is Reversed. The case is Dismissed.